

Rudy Petroleum Sdn Bhd (dalam likuidasi) v HSAP Sdn Bhd A

HIGH COURT (PENANG) — SUIT NO PA-22NCVC-39-02 OF 2020
WONG HOK CHONG JC
2 AUGUST 2021 B

Civil Procedure — Security for costs — Plaintiff company in liquidation — Defendant applied for security for costs — Whether merits of the case should be considered — Whether plaintiff had high chance of success — Whether order would be oppressive to plaintiff — Companies Act 2016 s 580A C

The plaintiff and defendant entered into a contract associate agreement dated 15 March 2018 in respect of a project known as ‘Engineering Procurement Construction and Commissioning for Diesel Subsea Pipe Replacement Project’. The defendant was responsible for the onshore work by providing the Marine Spread required by the plaintiff to carry out their offshore work. Before the plaintiff could complete the offshore work, the Marine Spread had to be demobilised, and the defendant asked the plaintiff to leave the project site on 24 July 2018. The plaintiff alleged that they were wrongfully terminated and claimed for RM4,100,692.92. As the plaintiff had been wound up, the plaintiff obtained the sanction of the director of insolvency to commence this suit. The defendant disputed the plaintiff’s allegation and filed the present application for security for costs premised on s 580A of the Companies Act 2016 (‘the CA’). The plaintiff challenged the defendant’s application on the grounds that: (a) their claim was bona fide and had high chance of success whereas the defendant’s defence and counterclaim was mala fide and was unlikely to succeed; and (b) security for costs would be oppressive against the plaintiff in the sense that it would stultify the plaintiff’s claim because it was unable to raise the necessary funds for the security for costs ordered. D E F G

Held, allowing the defendant’s application:

- (1) The fact that the plaintiff was wound up was sufficient reason to believe that it would be unable to pay the costs of the defendant if the defendant were successful in their defence. Although the plaintiff’s claim was bona fide, the plaintiff had not demonstrated that there was high degree of probability of success or, conversely, that the defendant’s defence was mala fide or had little chance of success. There was little by way evidence or submission on the merits before the court. Therefore, the merits of the case should not be a consideration at this stage (see paras 9 & 16). H I
- (2) The plaintiff had not disclosed the persons who were behind the suit (either the shareholder and/or creditor) or furnished any evidence that these persons were without means. Therefore, the argument that security

A for costs was oppressive must fail. The defendant had demonstrated that they would be exposed to unrecovered costs if they were to succeed, whereas the plaintiff had not demonstrated that they had a very high chance of success or that the security for costs order would be oppressive (see paras 20–21).

B **[Bahasa Malaysia summary]**

Plaintif dan defendan telah memasuki perjanjian kontrak bersekutu bertarikh 15 Mac 2018 berkenaan dengan projek yang dikenali sebagai 'Engineering Procurement Construction and Commissioning for Diesel Subsea Pipe Replacement Project'. Defendan bertanggungjawab ke atas kerja darat dengan menyediakan Marine Spread yang diperlukan oleh plaintiff untuk menjalankan kerja luar pesisir mereka. Sebelum plaintiff dapat menyiapkan kerja luar pesisir, Marine Spread perlu diberhentikan, dan defendan meminta plaintiff meninggalkan tapak projek pada 24 Julai 2018. Plaintiff mendakwa bahawa mereka telah ditamatkan perkhidmatan secara salah dan menuntut sebanyak RM4,100,692.92. Oleh kerana plaintiff telah digulung, plaintiff mendapat kebenaran pengarah insolvency untuk memulakan tindakan ini. Defendan mempertikaikan dakwaan plaintiff dan memfailkan permohonan jaminan untuk kos semasa berdasarkan s 580A Akta Syarikat 2016 ('AS'). Plaintiff mencabar permohonan defendan atas alasan bahawa: (a) tuntutan mereka adalah bona fide dan mempunyai peluang yang tinggi untuk berjaya manakala pembelaan dan tuntutan balas defendan adalah mala fide dan tidak mungkin berjaya; dan (b) jaminan untuk kos akan menindas terhadap plaintiff dalam erti kata ia akan menghalang tuntutan plaintiff kerana ia tidak dapat mengumpul dana yang diperlukan untuk jaminan untuk kos yang diperintahkan.

Diputuskan, membenarkan permohonan defendan:

- (1) Hakikat bahawa plaintiff telah digulung adalah alasan yang mencukupi untuk mempercayai bahawa ia tidak akan dapat membayar kos defendan sekiranya defendan berjaya dalam pembelaan mereka. Walaupun tuntutan plaintiff adalah bona fide, plaintiff tidak menunjukkan bahawa terdapat tahap kebarangkalian kejayaan yang tinggi atau, sebaliknya, pembelaan defendan adalah mala fide atau mempunyai sedikit peluang untuk berjaya. Terdapat sedikit keterangan atau penghujahan mengenai merit di hadapan mahkamah. Oleh itu, merit kes tidak seharusnya menjadi pertimbangan pada peringkat ini (lihat perenggan 9 & 16).
- (2) Plaintiff tidak mendedahkan orang-orang yang berada di belakang saman itu (sama ada pemegang saham dan/atau pemiutang) atau memberikan sebarang keterangan bahawa orang-orang ini tidak mempunyai dana. Oleh itu, hujahan bahawa jaminan untuk kos adalah menindas harus gagal. Defendan telah menunjukkan bahawa mereka akan terdedah kepada kos yang tidak dapat diambil semula sekiranya mereka berjaya, manakala plaintiff tidak menunjukkan bahawa mereka mempunyai

peluang yang sangat tinggi untuk berjaya atau bahawa perintah jaminan untuk kos akan menindas (lihat perenggan 20–21).]

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Cases referred to

CNLT (Far East) Bhd (dalam likuidasi) v JCT Ltd [2018] MLJU 1079; [2018] 1 LNS 1127, HC (folld)

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Customer Loyalty Solutions Sdn Bhd v Advance Information Marketing Bhd & Anor [2017] MLJU 1919; [2017] 1 LNS 1894, HC (refd)

Haidakota (M) Sdn Bhd v Tan Tiam Chai [2008] MLJU 654; [2009] 1 CLJ 699, CA (refd)

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North Plaza Sdn Bhd v United Securities Sdn Bhd [2010] 1 MLJ 631; [2010] 1 CLJ 470, CA (refd)

Legislation referred to

Companies Act 2016 s 580A

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Ashok Kumar a/l Raman (AK Raman Nair) for the plaintiff.

Chai Tze Jing (Razlan Hadri Zulkifli with her) (Gan, Ho & Razlan Hadri) for the defendant.

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Wong Hok Chong JC:

INTRODUCTION

[1] This is the defendant's application for security for cost. After hearing submissions, I allowed the application. These are the grounds for my decision.

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BACKGROUND

[2] The background facts are as follows. The plaintiff and defendant entered into a contract associate agreement dated 15 March 2018 in respect of project known as 'Engineering Procurement Construction and Commissioning for Diesel Subsea Pipe Replacement Project' at the Chevron Prai Terminal.

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[3] The defendant was responsible for the onshore work whereas the plaintiff the offshore work. The defendant was responsible for providing the Marine Spread required by the plaintiff to carry out their offshore work.

[4] Before the plaintiff could complete the offshore work — there was till 9.97% of outstanding work — the Marine Spread had to be demobilised. The defendant asked the plaintiff to leave the project site on 24 July 2018.

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A [5] The plaintiff allege that they were wrongfully terminated and is claiming for RM4,100,692.92 owing to them.

B [6] The defendant dispute this allegation. They say that they had appointed the Marine Spread for 33 days. The allocation period had ended and it had to be demobilised. They were later ready to provide a new Marine Spread for the plaintiff to complete the outstanding work. However, the plaintiff did not respond to the defendant's request to complete the outstanding work. The defendant proceeded to complete the works without the plaintiff. They claim that there is a sum of RM347,985.32 owing to them.

C WINDING UP AND SANCTION TO SUE

D [7] The plaintiff was wound up by a court order dated 5 July 2018 premised on a judgment debt owing to Jasa Merin. The plaintiff obtained the director of insolvency's sanction to commence this suit.

APPLICATION FOR SECURITY FOR COST

E [8] The defendant filed this application for security for cost premised on s 580A of the Companies Act 2016 ('the CA') which provides as follows:

580A Security for costs

F (1) Where a company is the plaintiff in any action or other proceedings and if it appears by a credible testimony that *there is reason to believe that the company will be unable to pay the costs of the defendant if the defendant is successful in his defence*, the court may order the plaintiff to give sufficient security for all the costs and to stay all action or proceedings until the security is given.

G (2) The court may direct the costs of any action or proceedings to be borne by the party to the action or proceedings.

WOUND UP OR UNABLE TO PAY COSTS

H [9] The fact that the plaintiff was wound up is sufficient reason to believe that it would be unable to pay the costs of the defendant if the defendant were successful in their defence.

I [10] The Court of Appeal in *North Plaza Sdn Bhd v United Securities Sdn Bhd* [2010] 1 MLJ 631; [2010] 1 CLJ 470 (CA), held as follows:

[28] In the instant case it is common ground that the respondent company has been wound up by the court. In *Northampton Coal, Iron and Waggon Co v Midland Waggon Co* [1878] 7 Ch D 500, Jessel MR said (at p 503):

I should say that *the fact of the plaintiff company being in liquidation would be*

sufficient 'reason to believe' the assets to be insufficient unless evidence to the contrary was given.

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[29] Based on the above principle, and considering that the respondent had been wound up by the court, there is, therefore, reason then to believe that the respondent would be unable to pay the costs of the appellant if the latter were to be successful in their defence — unless evidence to the contrary is given by the respondent. The inquiry then would be: has the respondent given any evidence to the contrary? We must say that we are unable to find any credible evidence to the contrary.

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BALANCE OF INTERESTS

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[11] In deciding whether or not to grant security for cost, the court is mindful of the need to balance the interest of the plaintiff to ventilate a genuine grievance and interest of defendant not to be exposed to the expense of defending a claim.

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[12] In *Haidakota (M) Sdn Bhd v Tan Tiam Chai* [2008] MLJU 654; [2009] 1 CLJ 699, the Court of Appeal held as follows:

[3] Special attention should be paid to the balance that should be drawn between exposing an innocent defendant to the expense of defending a claim against the risk of shutting out a plaintiff from ventilating a genuine grievance. See *Quality Tractors (M) Sdn Bhd v United Asian Bank Bhd* [1980] 1 MLJ 95; [1979] 1 LNS 84.

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CHALLENGE ON TWO GROUNDS

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[13] The plaintiff challenges the defendant's application on two grounds.

MERITS

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[14] First, the plaintiff say that their claim is bona fide and has high chance of success whereas the defendant's defence and counterclaim is mala fide and is unlikely to succeed. The defendant naturally disputes this.

[15] On the consideration of the merits of the respective parties' case, I am guided by the following passage of the High Court's judgment in *CNLT (Far East) Bhd (dalam likuidasi) v JCT Ltd* [2018] MLJU 1079; [2018] 1 LNS 1127 (HC):

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[23] I find the defendant's application for security for costs is not oppressive as to stifle the claim of the plaintiff as so alleged. Further, having regard to all the particular circumstances of this case, I find based on the facts and pleadings, whether the defendant is responsible for the plaintiff's financial position forms the crux of the issues to be tried. The merits of the case is not a consideration at this stage. I draw support from *Keary Developments Ltd* where the English Court of

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A Appeal at p 540 stated:

B In considering all the circumstances, the court will have regard to the plaintiff company's prospects of success. *But it should not go into the merits in detail unless it can clearly be demonstrated that there is a high degree of probability of success or failure* (see *Porzelack KG v Porzelack (UK) Ltd* [1987] 1 All ER 1074 at p 1077; [1987] 1 WLR 420 at p 423 per Browne-Wilkinson VC).

FINDING

C [16] I have no doubt that the plaintiff's claim is bona fide. But I do not think that the plaintiff have demonstrated that there is high degree of probability of success or, conversely, that the defendant's defence was mala fide or had little chance of success. In fact, there was little by way evidence or submission on the merits before the court. Therefore, the merits of the case should not be a
D consideration at this stage.

OPPRESSIVE

E [17] Second, the plaintiff say that security of cost would be oppressive against them — oppressive in the sense that it would stultify the plaintiff's claim because it is unable to raise the necessary funds for the security for cost ordered.

F [18] To succeed on this ground, the plaintiff must to demonstrate that those who are behind the claim and stand to gain for the litigation if successful (such as the shareholders or the creditors) are also without means to raise the necessary funds for the security for cost ordered.

G [19] In *Customer Loyalty Solutions Sdn Bhd v Advance Information Marketing Bhd & Anor* [2017] MLJU 1919; [2017] 1 LNS 1894, the High Court held as follows:

H [54] It is a valid proposition of law that in an application for security for cost, *the onus is on the plaintiff who resists such application (on the argument that to give security will effectively stultify the action) to demonstrate that those who stand behind the plaintiff company (such as shareholders and creditors) and who will benefit from the litigation if it is successful, are also without means* (see *Bell Wholesales Co Pty Ltd v Gates Export Corporation & Ors* [1983] 52 ALR 176).

I [55] In the High Court case of *Government of Sarawak v Sami Mousawi-Utama Sdn Bhd (in liquidation)* [1998] 3 MLJ 820; [1998] 4 CLJ 175 it was held thus:

... Therefore, I am of the view that the respondent had not produced evidence to show that the contributors or shareholders of the respondent, who stand to benefit if the action is successful, are financially not able to fund the action or are reluctant to provide the funds for security for costs. It must not be forgotten that they, the contributors or shareholders, stand a benefit if the action is successful

while remaining unaffected by the consequence of a failed action. On the other hand, the applicant would not be able to recover any costs if the action should fail. Furthermore, fund was procured on behalf of the respondent for the payment of the deposit for the fees of the arbitrators. Thus, I am unconvinced that an order for security for costs will have the effect of stifling the action. Those fact also constitute the 'special circumstances' referred to in *Re Pavelic* justifying the making of an order for security for costs.

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[56] *For all intents and purposes it can be said that the party now funding the writ action of the plaintiff may be seeking to take advantage of its success but could be deciding not to emerge should the plaintiff not succeed. In this not unlikely scenario now faced by the defendants, sans security for their costs, if the plaintiff fails in the action, recovery by the defendants for costs could be illusory.* There is no evidence that the plaintiff cannot fund the litigation even if it seeks to depend on other resources.

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[57] But still, in the instant case, *whilst the plaintiff averred that the applications constituted an attempt to stifle its writ action, no evidence whatsoever has been given to show that the plaintiff is otherwise unable to raise funds to meet the costs involved. In such event it cannot be said that to order the giving of security for costs would stifle the claim.*

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[58] That is not all. *For the plaintiff has also conversely not demonstrate any credible evidence to even suggest that it is in a position to actually pay the costs of the defendants should the latter succeed in resisting the plaintiff's claim in the writ action. The plaintiff is after all already in liquidation. Without security for cost against the plaintiff, the defendants would likely suffer from unfair prejudice given the resources and time expended to defend the plaintiff's claim.*

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FINDING

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[20] The plaintiff has not disclosed the persons who are behind this suit (either the shareholder and/or creditor) or furnished any evidence that these persons are without means. Therefore, the argument that security for cost is oppressive must fail.

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CONCLUSION

[21] In summary, the defendant has demonstrated that they would be exposed to unrecovered cost if they were to succeed; whereas the plaintiff have not demonstrated that they have a very high chance of success or that the security for cost order would be oppressive.

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[22] For the above reasons, I allowed the defendant's application for security for cost. As for the quantum, I reduced it from the sum that was prayed for (RM300,000) down to RM100,000 which is reasonable for a High Court trial with a claim quantum of RM4,100,692.92.

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A *Defendant's application allowed with quantum varied.*

Reported by K Selvaraju

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